

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Original with affidavit of
mauling*

74-2012

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p. 15.*

To be argued by
JOAN S. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2012

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—against—

OTTAVIO LA MANTIA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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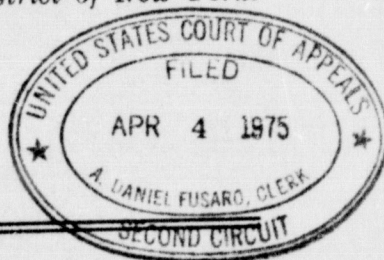


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2012

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

OTTAVIO LA MANTIA,

Defendant-Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Ottavio La Mantia appeals from a judgment of conviction entered on June 27, 1974 after trial by jury in the United States District Court for the Eastern District of New York (Bartels, J.) which judgment convicted him of aiding and abetting Angelo Pinto * in the knowing possession with the intent to distribute of approximately 108.8 grams of cocaine in violation of Title 21, U.S.C., § 841(a)(1) and Title 18, U.S.C., § 2. Appellant was sentenced to a term of imprisonment of four years pursuant to Title 18, U.S.C., Section 4208(a)(2) and a special parole term of three years.

* The co-defendant Angelo Pinto entered a plea of guilty on February 6, 1974 and was sentenced to a four year term of imprisonment pursuant to Title 18, U.S.C. § 4208(a)(2) and a special parole term of five years.

Appellant is presently released on bail awaiting determination of this appeal.*

On appeal, appellant urges as error the admission into evidence of the statements by his co-venturer Angelo Pinto made to an undercover officer during the course of the narcotic transaction in the absence of a conspiracy count.

Statement of Facts

A. The Government's Case

On October 16, 1973 Agent James Deignan of the Drug Enforcement Task Force met with Angelo Pinto in the Par III Bar, Court Street, Brooklyn. At this time, Agent Deignan, acting in an undercover capacity negotiated for the purchase of one kilo of cocaine. Thereafter, Pinto attempted to contact several different sources of cocaine (one of whom, he stated, frequented the Court Terrace Bar) but he was unsuccessful in obtaining narcotics (26-27).**

On November 13, 1973 Pinto called Agent Deignan and said that he had "four for thirty-one", meaning four ounces of cocaine for \$3,100. Pinto told Agent Deignan to meet him on a corner on Court Street at 9:50 that evening (28). At that time, Agent Deignan arrived at the agreed location and Pinto entered the agent's car. After they exchanged greetings Agent Deignan asked, "Do you have the cocaine on you?" Pinto responded, "No. We have to go to a friend's apartment for it" (29). They then proceeded to Ninth Street, Brooklyn at which time Pinto informed Deignan that his "friend" would like to meet Deignan to

* This was appellant's second trial on these charges. A prior trial ending on February 22, 1974 had resulted in a mistrial due to a hung jury.

** Numbers in parenthesis refer to the pages of the trial transcript of April 23, 1974.

arrange for a future kilo transaction of cocaine. Pinto told Deignan that he only made \$200 on the transaction and that his source was to be paid \$2900 (30). When they arrived in the vicinity of Clinton Street and Second Place in Brooklyn, Deignan parked the car and Pinto asked the agent to come with him to an apartment to meet his friend. Deignan declined (30-31). Pinto left the car, went inside 44 Second Place, Brooklyn, New York and exited in five to eight minutes with appellant (31, 68). At this time, Pinto went up to the agent's car on the driver's side leaving appellant at the curb and informed Agent Deignan, "I have the cocaine in my pocket. My friend is across the street and would like to meet you" (31, 43, 49, 68). Deignan informed Pinto that the money was in the trunk and, as he exited the car he heard appellant yell, "Bring the money and come over" (31-33, 48, 86). Deignan asked, "Should I bring the money" and the appellant answered "Yes" (33).

As appellant walked from the curbside to Deignan's car, surveillance agents arrested Angelo Pinto and appellant (33, 69). A search pursuant to the arrest revealed that Angelo Pinto had 108.8 grams of cocaine in his right pocket (51-52, 97) and that appellant had a starter's pistol in his right back pocket (69). On the way to the office, Special Agent Charles Perrigo of the Drug Enforcement Administration read to appellant his constitutional warnings (53-57, 70). Thereafter, appellant informed the arresting agents in the car that he had gotten the cocaine as a favor for Pinto (57) and he became involved because he was losing his house because of back taxes owed (57, 71). He claimed that it was the first time he had ever done anything like this before (57). When asked about his supplier for the drugs, appellant stated that he received the drugs from an unknown man in a neighborhood bar and that although he was to return the money for the drugs to this man he did not know the location of the bar (57, 71). He further stated that he carried the starter pistol

"as a bluff" (58, 71) and that he resided at 44 Second Place, Brooklyn, New York (58, 71).*

B. The Defense Case

At trial, appellant testified that although he knew Angelo Pinto for approximately ten to fifteen years, he had seen Pinto in the preceding year on only one or two occasions (102-103). According to appellant, Pinto had never been to his home before November 13, 1973 and he had never called Pinto at his home (109-110). On cross-examination, however, appellant admitted that he had Pinto's first name "Angelo" and his phone number in his address book (113-114, 125). Appellant also admitted that his address book also contained the phone number of the Court Terrace Lounge, a bar that he frequented (111-112). Appellant, however, denied discussing or distributing narcotics with Pinto (103). He testified that on the night in question Pinto merely came to his home and asked him to meet a friend of his outside the house (103-105). As he followed Pinto out of the house, he was arrested (106). Appellant denied making the statement, "Bring the money and come over" (115) and did not recall making statements to the officers about purchasing cocaine from an unknown man in a bar either en route or in Task Force headquarters (121-123). Appellant also stated that although it was true that he owed back taxes on his house, he could not recall making this statement to any agents or officers (119-121). Appellant's explanation of the starter's pistol at trial was that he had been watching television immediately prior to Pinto's visit at which time he was looking at this pistol which he had found. When Pinto rang the doorbell, he simply placed it in his pocket (123-124). Appellant denied making any statements at his arrest that the pistol was "to pull a bluff" (123-124).

* After appellant arrived at the Joint Task Force headquarters he was interviewed by Special Agent Lex Henderson and, once again, reiterated most of the statements he had made to the arresting officers in their car (87-88).

A R G U M E N T

Pinto's hearsay statements to the undercover agent were properly admitted.

Appellant argues that the admission in evidence of the statements made by Angelo Pinto to the undercover agent denied him his Sixth Amendment right to confront witnesses. Appellant contends that since he was not indicted on a conspiracy count, Pinto's statement should not have been admitted under the conspiracy exception to the hearsay rule.

It has been well established that out of court declarations of a co-conspirator are admissible against a defendant where a joint venture is shown by the evidence, even when a conspiracy is not alleged in the indictment. *United States v. Alsondo*, 486 F.2d 1339, 1347 (2d Cir. 1973) (rehearing); *United States v. Granello*, 365 F.2d 990, 995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967); *United States v. Annunziato*, 293 F.2d 373, 378-81 (2d Cir.), cert. denied, 368 U.S. 919 (1961); *United States v. Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945); *People v. Luciano*, 277 N.Y. 348, 358; 14 N.E. 2d 433, 443 (1938); Cf. *St. Clair v. United States*, 154 U.S. 134, 149 (1894) (co-venturers statements admitted as "res gestae").

Pinto's out of court statements were clearly admissible because there was a fair preponderance of the independent evidence which showed that Pinto and appellant had a common purpose, participated in a joint venture, and that Pinto's declarations were made during the course of and in furtherance of this venture. *United States v. Annunziato*, *supra*, 293 F.2d at 378; *United States v. Pugliese*, *supra*, 153 F.2d at 500. See generally, *United States v. Tramunti*, — F.2d — (2d Cir. slip opinion, 2141; decided March 7, 1975); *United States v. Cirillo*, 499 F.2d 872, 884-886 (2d Cir. 1974); *United States v. Ruiz*, 477 F.2d 918, 919

(2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969); *cert. denied sub nom. Lynch v. United States*, 397 U.S. 1028 (1970).

Here, there was more than sufficient independent evidence to warrant the District Court's finding (25-26, 98-100) that appellant knowingly participated in a joint venture with Angelo Pinto. In the first place, Pinto went into appellant's house and exited his premises shortly thereafter accompanied by appellant (31, 68). After a brief conversation between Pinto and Agent Deignan, Agent Deignan (31-32) and Agent Henderson, on surveillance (86), heard the appellant yell across the street, "Bring the money and come on over". When Deignan asked, "Should I bring the money?", appellant answered "yes" (33). At his arrest, a starter's pistol was found in appellant's pocket (69) as well as the name "Angelo" and Angelo Pinto's phone number in his address book (113-114, 125). His address book also contained the name and phone number of the Court Terrace Lounge (111-112). *Cf. United States v. Ruiz, supra*, 477 F.2d at 919-920; *United States v. Tramunti, supra*, slip op. at 2141-2143.

In addition to the above evidence, there were also the statements of appellant himself which evidenced his knowing participation in the criminal enterprise. On two occasions (on the way to Joint Task Force Headquarters [57-58, 71] and at these headquarters [87-88]) appellant admitted to providing Pinto with the cocaine to do him "a favor" and to prevent a loss of his house to back taxes (57, 71). He stated in the car that his supplier was an unknown man in an unknown bar (57, 71) and he also admitted that he carried the starter's pistol "as a bluff" (58, 71). *Cf. United States v. Cirillo, supra*, 499 F.2d at 884 (statements of defendant Lilienthal).

In the context of this entire, small conspiracy,* the acts and statements of appellant, as well as the physical and documentary evidence found on his person at arrest more than adequately allows a finding that Pinto and appellant had a common purpose, that appellant participated in a joint venture with Pinto and that Pinto's declarations to Agent Deignan were made during the course of and in furtherance of this joint venture. Accordingly, they were properly admitted.

CONCLUSION

The judgment of conviction should be affirmed.

April 4, 1975

Respectfully submitted,

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Of Counsel.

* In a small criminal venture the evidentiary value of a defendant's acts and statements to infer his knowledge of the entire conspiracy is greater than in a broader wideranging criminal venture. *United States v. Tramunti, supra*, slip op. at 2149 and n. 27.

AFFIDAVIT OF MAILING

STATE OF NEW YORK

COUNTY OF KINGS

EASTERN DISTRICT OF NEW YORK

} ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 4th day of April 19 75 he served two copies ~~copy~~ of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Zerin, Cooper and Horlick, P.C.

26 Court Street

Brooklyn, N. Y. 11242

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

4th day of April 19 75

Ralph Mahon

RALPH MAHON

Notary Public, State of New York

No. 24-4501889

Qualified in Kings County

Commission Expires March 30, 19 77